

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

DAIRY FARMERS OF AMERICA, INC.

Employer

and

**Case 6-RC-12715**

TEAMSTERS LOCAL UNION NO. 261 a/w  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, Dairy Farmers of America, Inc., is engaged in the production of cheese. Solely involved in this proceeding is the Employer's facility in New Wilmington, Pennsylvania. The Petitioner, Teamsters Local Union No. 261 a/w International Brotherhood of Teamsters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time production and maintenance employees, including shipping and receiving employees and laboratory employees, employed by the Employer at its New Wilmington, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the Employer filed a timely brief with me.

The Employer contends, contrary to the Petitioner, that the approximately ten laboratory technicians<sup>1</sup> employed at the New Wilmington facility must be excluded from the unit on the basis that they are professional employees and/or technical employees who do not share a community of interest with the other employees in the petitioned-for unit. The Employer agrees that all of the other petitioned-for employees are properly included in the unit. The Petitioner

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<sup>1</sup> The parties use the terms laboratory employees, laboratory technicians and lab techs interchangeably. For ease of reference I will refer to these employees in the decision as laboratory technicians.

has indicated a willingness to proceed to an election in any unit found appropriate herein. There is no history of collective bargaining for any of the employees involved herein.

I have considered the evidence and the arguments presented by the parties on the issues. As discussed below, I have concluded that the laboratory technicians are not professional employees. I have further concluded that they share a sufficient community of interest with the petitioned-for employees to be included in the unit found appropriate herein.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

## **I. OVERVIEW OF OPERATIONS**

The Employer is a nationwide dairy marketing cooperative that markets milk for dairy farmers in 45 states. At the Employer's New Wilmington, Pennsylvania, facility, the Employer produces provolone and mozzarella cheese with milk delivered directly from farms.

The Employer's New Wilmington facility is a two-story building which is divided into two sections which are designated as the cheese plant and the whey plant.<sup>2</sup> The production area of the cheese plant is located on the first floor of the facility. The cheese lab, where nine laboratory technicians work, is on the second floor where the office clerical employees, various management employees and other salaried employees work.

The production area of the whey plant is located on the first floor in the whey plant section of the facility. The whey lab, where one laboratory technician works, is also located in the whey plant section of the facility on the first floor. The record indicates that some supervisory offices are located in the general area of the whey lab and that the whey lab is not considered part of the production floor.

The overall operations of the facility are the responsibility of Plant Manager Tim Sallmen. Reporting directly to Sallmen are Human Resources and Safety Manager Robert Christoff,

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<sup>2</sup> As will be discussed herein, whey is a by-product of cheese production. The cheese production area and the whey production area are located at opposite ends of the facility.

Quality Assurance Manager David Shimo, Whey Plant Manager Robin Barbour, Evaporation Supervisor John Wilson, Maintenance Department Manager George Vasko, and Cheese Operations Manager Gary Shivley. Reporting directly to Shivley in the Cheese Operations are three supervisors to whom the production employees directly report. They are: Ronald McConnell, William Spaulding, and David Wigley. In the Maintenance Department, Supervisor Bob Johns reports directly to Maintenance Department Manager Vasko. In the Quality Assurance Department, in which the laboratory technicians work, Quality Control Supervisor Gail Harper and Lab Supervisor Darcie Meiss report to Shimo.<sup>3</sup>

The Employer operates 24 hours a day, seven days a week. The record indicates that the production and maintenance employees and the laboratory technicians work eight-hour shifts on either the day, afternoon or midnight shift. The Employer employs approximately 150 production and maintenance employees, not including the leadpersons and the laboratory technicians.

## **II. EMPLOYEES INVOLVED IN THE PRODUCTION PROCESS**

The Employer's production process begins with the delivery of milk by tanker truck. Milk is poured or pumped into vats and culture is added to start the cheese-making process. After the mixture is cooked, the cheese is separated from the whey. The cheese curd is then

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<sup>3</sup> The parties stipulated, and I find, that Sallman, Shimo, Barbour, Wilson, Vasko, Shivley, Harper, Johns, McConnell, Spaulding and Wigley are supervisors within the meaning of the Act based on their possession of one or more of the supervisory indicia listed in Section 2(11) of the Act.

I further find that Human Resources and Safety Manager Christoff is a statutory supervisory based on his authority relating to the hiring, firing and disciplining of employees. The record is silent as to the status of Lab Supervisor Darcie Meiss. Meiss works on the dayshift and assists with the training of new laboratory technicians. The record indicates that all laboratory technicians report to Meiss, who, in turn, reports to Shimo. No further details are known as to her responsibilities and authorities. Inasmuch as I cannot determine whether Meiss is a supervisor within the meaning of Section 2(11) of the Act, I will allow her to vote subject to challenge in the election directed herein.

Finally, the parties also stipulated that the approximately 27 leadpersons working in the various departments do not possess supervisory authority and, therefore, are properly included in the unit found appropriate herein. The leadpersons are: Chris Hendricks, Brad Collins, Ken Gottberg, Rick McConahy, Rick Martin, Matt Pettigrew, Samuel J. Clark, Seth Hostetler, Robert Feil, Gary Blair, Hans Good, William Gould, Chris Heffernan, Jerry Jones, Robert Toy, Mike Garrett, Shaun Hooks, Steve Johns, Craig Long, Larry Pasquarella, George Taylor, Robert Syphrit, Brian Torsello, Lonnie Goodrum, Kevin McElrath, Kevin Reed and Steve Toth.

pumped into automatic molding equipment to be molded to various sizes. The cheese molds are then sent to “cages” where they are soaked in brine for approximately ten hours to absorb salt. Once this process is completed, the cheese is sent through a cheese washer, after which it is moved by conveyor belt to be bagged, vacuumed sealed, packaged and labeled for shipment to particular customers.

The whey by-product is sent to the whey plant portion of the Employer’s facility where it is dried to become a powder. The powder is then bagged and packaged for sale.

The Employer’s production process is not complete without quality assurance testing. As noted, the Employer employs nine laboratory technicians in its cheese lab and one laboratory technician in its whey lab to perform testing on the incoming milk. The laboratory technicians also perform testing on the equipment used in the process and on the finished cheese or whey product.

The Employer’s laboratory technicians are not required to possess an advanced degree; a high school degree or GED is the only requirement. The record establishes that the Employer posts job openings for laboratory technician positions for bid within the plant and hires “off the street” if no one from within the company applies for the position. The record reveals that five or six of the ten current laboratory technicians were previously employed as production employees. Once hired, the laboratory technician is required to complete on-the-job training.

The laboratory technicians are required to obtain a license from the Department of Agriculture’s Milk Marketing Board (MMB). In this regard the Employer provides a training process and study materials for new laboratory technicians. When the Employer considers the laboratory technician to be sufficiently trained<sup>4</sup> it contacts the MMB. The MMB sends a representative to administer a written test which takes approximately one to two hours to complete. If the laboratory technician passes the test, the MMB issues a milk tester’s license.

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<sup>4</sup> Depending on the individual, the training process takes from one to six months.

The Employer's laboratory technicians are also required to obtain a certification to perform certain additional testing. To become certified, laboratory technicians must participate in State testing known as "splits."<sup>5</sup> Each laboratory technician receives several sets of milk samples. One set is for plating, which is a test to determine the number of bacteria present. Additional sets of milk are tested for antibiotics, and the final set is for the somatic cell test which determines the presence of white blood cells. Once certified, the laboratory technicians must continue to be tested on splits annually thereafter to maintain their certification. The record indicates that a failure to remain certified could have adverse consequences on the employment status of the Employer's laboratory technicians.<sup>6</sup> Hourly production and maintenance employees are not required to possess any license or become certified to perform any of their functions.<sup>7</sup>

Every incoming tanker of milk is tested for antibiotics.<sup>8</sup> If any antibiotics are found, the truckload of milk must be rejected pursuant to Food and Drug Administration Regulations. The record reflects that tankers of milk are rejected several times each year. If contaminated milk was inadvertently allowed to be processed, the cheese containing that milk would have to be disposed of or, if the product was already shipped when the error was discovered, the Employer would have to have a recall of the product. The record does not reveal whether either of these scenarios has ever occurred.

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<sup>5</sup> Splits are sets of milk samples sent to the facility by the Pennsylvania Department of Agriculture.

<sup>6</sup> The most critical certification at the Employer's facility is the antibiotic certification. No laboratory technician has lost his or her certification in the last ten years.

<sup>7</sup> The record does not reflect what training the production and maintenance employees undergo to perform their jobs.

<sup>8</sup> The antibiotic tests performed by the laboratory technicians are the Delvo Test and the Charm Rosa SL Test. The Delvo test involves putting milk samples in a miniature tray which contains discs that hold bacteria. Some of the samples are identified as positive controls and others are negative controls. The tray is incubated for a specified period of time after which the positive and negative controls are compared to ascertain the presence of antibiotics. The Charm Rosa test involves placing a test strip in the sample and then placing the test strip in the incubator for eight minutes. After eight minutes the strip is placed in the Rosa reader which will show whether any beta-lactum antibiotics are present in the milk.

Approximately 70 percent of the milk deliveries occur on the dayshift.<sup>9</sup> One of the production employees in the job classification of milk receiver extracts the milk sample from the tanker, which is then sent to the lab via a tube or chute. The laboratory technician runs the antibiotic test, which is completed in about eight minutes. If the test result is positive, the laboratory technician is required to complete certain governmental paperwork and then will resample the tanker's milk to ensure that the initial result was not a false positive. If the sample again tests positive, the laboratory technician is required to reject the milk shipment. The laboratory technician either informs the tanker driver directly of the rejected status or informs the milk receiver, who in turn relays the information to the driver. In addition, if the tanker of milk is rejected, the Employer must perform a producer trace back.<sup>10</sup> Because up to 20 test samples can be involved in trace back testing, the milk receiver will personally deliver these samples to the laboratory technician. Antibiotic testing accounts for approximately 25 percent of the laboratory technicians' work time on the dayshift.

Laboratory technicians perform testing other than antibiotic testing during their shifts. The laboratory technicians test milk samples through the Foss analyzer throughout the day. In addition, every 15 minutes throughout all shifts production employees deliver cheese samples in 5, 12 or 20 pound blocks from which a laboratory technician obtains samples for testing.

On the evening or midnight shift, the laboratory technician must go to the production floor to run pieces of cheese through the metal detector in the Package Department. The record establishes that all of the Employer's product must pass through the metal detector, and this function is performed by a production employee approximately every two hours throughout all three shifts. Then, on either the evening or midnight shift, the laboratory technician operates

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<sup>9</sup> Two laboratory technicians are scheduled to work on dayshift at the facility. On the day of the hearing, the Employer was scheduled to receive 1.8 million pounds of milk from about 40 trucks.

<sup>10</sup> The tanker driver is required to keep a sample of the milk from each dairy farm from which milk is received. If the milk tests positive for antibiotics, all of the tanker driver's milk samples are tested so that the offending milk producer can be traced.

the metal detector once in every 24-hour period for approximately 15 minutes to independently verify that the metal detector is operating properly.

The laboratory technician on either the afternoon or midnight shift also obtains swabs of approximately 20 surfaces of the equipment which come in contact with the cheese.<sup>11</sup> The record reveals that many of the swabs are taken while the equipment is operating. However, at least one of the laboratory technicians asks the production employees to stop the equipment known as the Viking when the swabs from this equipment are obtained. The swabbing of the equipment on the production floor takes approximately 45 minutes.

All of the hourly employees<sup>12</sup> are subject to the same Hourly Employee Handbook, which contains employee policies<sup>13</sup> and conduct rules. The same benefit package is available to the production and maintenance employees and laboratory technicians.<sup>14</sup> The laboratory technicians, like the production and maintenance employees, punch a time clock. Although all hourly employees share the same lunchroom, the record indicates that some of the laboratory technicians choose to eat lunch at a table outside the lab area.<sup>15</sup> All hourly employees enjoy identical vacation benefits.

Hourly positions are categorized for pay purposes from Grade 1 to Grade 6, with Grade 1 being the lowest-paid position and Grade 6 being the highest-paid position. The record

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<sup>11</sup> Swabbing occurs once in every 24-hour period.

<sup>12</sup> Other than the employees in the petitioned-for unit, the office clerical employees apparently are the only other hourly employees employed at the facility.

<sup>13</sup> Although not an employment "policy," the record reflects that the Quality Assurance Manager allows laboratory technicians some flexibility with respect to medical appointments that production and maintenance employees apparently do not enjoy. Specifically, laboratory technicians are permitted to attend an appointment and return to the facility when the appointment is over. The record does not indicate how often this occurs.

<sup>14</sup> The same benefit package is also available to the Employer's salaried employees as well as its office clerical employees.

<sup>15</sup> There are certain shifts during which only one laboratory technician is on duty. During those times, the laboratory technician is not permitted to leave the lab area to eat lunch.

establishes that laboratory technicians are Grade 3 employees after their training is completed. Other hourly production positions, including forklift operator, scale operator and milk receiver are also compensated at the Grade 3 level.<sup>16</sup>

The production and maintenance employees wear a uniform at work, whereas laboratory technicians wear a lab coat. However, the laboratory technicians are required to wear a bump cap and acceptable footwear when they enter the production floor.<sup>17</sup>

### III. DISCUSSION AND ANALYSIS

The Board has held that in order for a unit to be appropriate for purposes of collective-bargaining within the meaning of the Act, the unit need not be the only appropriate unit or the most appropriate unit; it need only be *an* appropriate unit. Barron Heating and Air Conditioning, Inc., 343 NLRB 450, 452 (2004), citing American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991); Overnite Transportation Co., 322 NLRB 723 (1996). Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for unit and, if the petitioned-for unit is appropriate, the inquiry ends. Barlett Collins Co., 334 NLRB 484 (2001). In representation proceedings the unit sought by the petitioner is always a relevant consideration. The Lundy Packing Co., 314 NLRB 1042, 1043 (1994).

Section 2(12) of the Act defines a professional employee as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring

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<sup>16</sup> The only Grade 1 position is custodian. Grade 2 positions include packer operator and loader operator. Grade 4 positions include certain warehouse lead persons and operators in the Whey Plant. Grade 5 positions include the production lead persons and master maintenance technicians. Grade 6 positions include maintenance lead persons.

<sup>17</sup> It appears that both production and maintenance employees and laboratory technicians must wear hairnets or hair restraints while working at the facility.



knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In Hazelton Laboratories, Inc., 136 NLRB 1609 (1962), the Board considered the employer's contention that laboratory technicians should be excluded from a petitioned-for unit as professional employees. The Board noted that the department and section heads of the employer's lab departments had backgrounds of professional training, including the possession of advanced university degrees. Working under the supervision of these individuals were the laboratory technicians who were directly involved in conducting and writing up the experiments performed by the employer. Although the large majority of the laboratory technicians were college graduates and the work required the exercise of a considerable degree of independent judgment and the study of technical literature, the Board found that their experiments were pre-set and ordinarily could be altered only by the laboratory technicians' supervisors. In addition, the Board specifically noted that employees with less than a formal high school education could progress to laboratory technician positions after three to five years in the employer's employ. Thus, the Board found that the laboratory technicians were not professional employees. The Board characterized performance of the laboratory technicians' practical work as requiring a background of knowledge gained primarily from on-the-job training, as contrasted with knowledge gained from prolonged courses of specialized intellectual instruction in an institution of higher learning.

In the instant case, none of the laboratory technicians possess a degree from an institution of higher learning, nor is there any requirement to possess such a degree. Five or six

of the ten laboratory technicians were formerly production employees, and it appears that all of the laboratory technicians' knowledge of the job comes from the training they receive on the job. In addition, the testing performed by the laboratory technicians at issue herein is pre-set and, other than retesting a sample of milk when a positive antibiotic result is found, the laboratory technician has no ability to alter the testing he or she is required to perform. The work of the laboratory technicians in testing the milk and cheese to determine whether they meet predetermined specifications does not involve the exercise of discretion and does not constitute independent judgment. Finally, contrary to the Employer's assertion that laboratory technicians work independently without any supervision, the record clearly establishes that the laboratory technicians report to Darcie Meiss who in turn reports to Quality Assurance Manager Shimo. If a major problem occurs on midnight shift when neither Shimo nor Meiss is working, the laboratory technicians have been instructed to contact Cheese Operations Manager Shivley or another management official. Accordingly, I find that the laboratory technicians are not professional employees.

The Employer asserts that if the laboratory technicians are not professional employees they should be found to be technical employees who do not share a community of interest with the rest of the petitioned-for employees. The Board has long applied the criteria that "... those held to be technical employees are employees who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature and involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses" (footnote omitted). Litton Industries of Maryland, Inc., 125 NLRB 722, 724-725 (1959). See also Vapor Corporation, 242 NLRB 776 (1979). However, it is well established that if technical employees otherwise share a community of interest with production and maintenance employees, they may be included in the same unit. Dynalectron Corporation, 231 NLRB 1147, 1148 (1977);

Airesearch Mfg Co. of Arizona, 137 NLRB 632, 635-636 (1962); The Sheffield Corporation, 134 NLRB 1101 (1961).

The Board uses an objective test to determine if technical employees should be excluded or separated from the unit with other employees. Each case is decided after weighing, among other things, the following considerations: 1) bargaining history; 2) common supervision; 3) similarity of skills and job functions; 4) contact and/or interchange with other employees; 5) similarity of working conditions; 6) type of industry; 7) organization of plant; 8) location of employees within the plant; 9) desires of the parties; and 10) whether any union seeks to represent the technical employees separately. The Sheffield Corporation, supra; Virginia Manufacturing Co., 311 NLRB 992 (1993).

In applying these standards to the instant case, I find that the record does not establish that the laboratory technicians qualify as technical employees. In this regard, I note that the record does not establish that any of the above-described positions require any formal or specialized training. Rather, all of the laboratory technicians' training is gained on the job. In addition, contrary to the Employer's contentions, the record does not establish that the laboratory technicians utilize independent judgment in their work. The testing of the milk upon arrival and the cheese as it is processed is performed so that the laboratory technician can document that the milk and cheese meet requirements fixed by the Federal Drug Administration and by the Employer. While the laboratory technicians have the authority to reject contaminated milk, this function does not establish independent judgment. If the milk does not meet regulatory requirements, the laboratory technician has absolutely no discretion in determining that the milk must be rejected. Thus, based on the record, the laboratory technicians only test milk and cheese to ensure compliance with predetermined levels. Accordingly, I find that the laboratory technicians are not technical employees because they do not utilize independent judgment. See The Folger Company, 250 NLRB 1 (1980). However, even if the laboratory technicians are technical employees, the Board no longer uses a per se rule to exclude them

from a larger unit. The Sheffield Corporation, supra.<sup>18</sup> As a result, the factors described above must be considered to determine whether or not the laboratory technicians share a community of interest with the other production and maintenance employees.

In considering the applicable factors, I conclude that the laboratory technicians possess a community of interest with the petitioned-for employees which permits their inclusion in the unit found appropriate herein. Although the laboratory technicians have separate direct supervision and spend the majority of their time in one of the labs away from the production floor, the record establishes that the work performed by the laboratory technicians is highly integrated into the production process. Moreover, the fact that the laboratory technicians work in a physically distinct area from the production area does not negate a finding that a community of interest otherwise exists. Blue Grass Industries, 287 NLRB 274, fn 10 (1987).

The record further reflects that there is regular contact between the laboratory technicians and the petitioned-for employees. The day shift laboratory technicians receive milk samples from the milk receiver and they communicate test results to the milk receivers. On the afternoon or midnight shift the laboratory technician performs work on the production floor for approximately one hour which involves operating the metal detector machine, which is otherwise operated by a production employee, and swabbing various equipment surfaces. In addition, cheese and other samples are brought to the lab every 15 minutes throughout all shifts

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<sup>18</sup> The Employer cites Lundy Packing Co., 314 NLRB 1042 (1994) in its brief for the assertion that the Board will not include technical employees with production employees unless the two groups have an "overwhelming" community of interest. However, in Lundy, the employer sought to have the laboratory technicians included in the petitioned-for unit over the objections of the petitioner. In those circumstances, which are not present here, the community of interest between the two groups had to be so strong as to mandate the inclusion of the laboratory technicians in the production and maintenance unit. Likewise, the Employer's reliance on Barnert Memorial Hospital Center, 217 NLRB 775 (1975) is misplaced. In that case the petitioner sought two separate units at a hospital. One unit was comprised of service and maintenance employees and the other was comprised of various technical employees, one group of which consisted of four technicians who worked in the hospital's laboratory. In finding technical status the Board noted that two of the four technicians were registered histology technicians. The other two technicians were nonregistered, but one had attended a six-month training program at a commercial school. The other nonregistered technician had no formal training but worked in the laboratory for 20 years. The Board noted that the hospital ceased hiring nonregistered technicians and that any further technicians who would be hired would be required to be registered technicians.

by a production employee. Frequently, the sample is handed to the laboratory technician by the production employee.

The laboratory technicians and the employees in the petitioned-for unit are subject to the same conduct rules and employment policies and share common benefits. The laboratory technicians are paid at grade 3, which is the same pay grade as is applicable to the milk receivers and the forklift and scale operators. In addition, both groups of employees work on all three shifts. Accordingly, based upon the above and the record as a whole, I shall include the laboratory technicians in the unit found appropriate herein. See Keller Crescent Co., 326 NLRB 1158 (1998); Ambrosia Chocolate, 202 NLRB 788 (1973).

#### **IV. FINDINGS AND CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including shipping and receiving employees and laboratory technicians, employed by the Employer at its New Wilmington, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

## **V. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union No. 261 a/w International Brotherhood of Teamsters. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior

Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **January 21, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>19</sup> by mail, or by facsimile transmission at 412-395-5986. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the

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<sup>19</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so *estops* employers from filing objections based on nonposting of the election notice.

## **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **January 28, 2010**. The request may be filed electronically through E-Gov on the Agency's website, [www.nlrb.gov](http://www.nlrb.gov),<sup>20</sup> but may not be filed by facsimile.

**DATED:** January 14, 2010

/s/Robert W. Chester

Robert W. Chester, Regional Director  
NATIONAL LABOR RELATIONS BOARD  
Region Six  
William S. Moorhead Federal Building  
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**Classification Index**  
**177-9375**  
**401-7550**  
**440-1760-3420**

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<sup>20</sup> To file the request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlrb.gov](http://www.nlrb.gov).